

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 63323-6-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
JAMES MONROE THORNE,	)	
	)	
Appellant.	)	FILED: August 2, 2010
	)	

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Appelwick, J. — James Thorne appeals the life sentence without possibility of parole that he received under the Persistent Offender Accountability Act (POAA), RCW 9.94A.030(34) and .570. He argues his sentence violates the state and federal prohibitions against cruel and unusual punishment. In State v. Thorne, 129 Wn.2d 736, 775–76, 921 P.2d 514 (1996), the Supreme Court determined that a life sentence without possibility of parole did not constitute cruel and unusual punishment as to this particular defendant. Thorne also argues that the State must prove to a jury beyond a reasonable doubt the other convictions necessary for sentencing him under the POAA. Under State v. Smith, 150 Wn.2d 135, 141–43, 75 P.3d 934 (2003), the State does not have to prove prior convictions to a jury; a judge may determine the existence of prior convictions. We affirm Thorne’s sentence.

## FACTS

On November 20, 2006, Thorne entered a Dollarwise store carrying a paper bag, telling employees that it was a bomb and that he was robbing the store. Employees gave Thorne money from the tills. The State charged Thorne with two counts of first degree robbery and one count of attempted first degree robbery. A jury found him guilty as charged. The court found the State had proven two prior robbery convictions beyond a reasonable doubt.

The court sentenced Thorne to life imprisonment without the possibility of parole under the POAA. Thorne appeals the constitutionality of his POAA sentence but does not challenge the underlying convictions for robbery and attempted robbery.

## DISCUSSION

### I. Cruel and Unusual Punishment

Thorne first argues that, given his history of documented mental illness, his sentence constitutes cruel and unusual punishment and therefore violates the Eighth Amendment and article I, section 14 of the Washington Constitution.

In State v. Fain, 94 Wn.2d 387, 397, 617 P.2d 720 (1980), the Supreme Court enunciated four factors to be considered in analyzing claims of cruel punishment: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction.

The Supreme Court previously considered this issue in Thorne. 129

Wn.2d at 749–50. Thorne had been charged and convicted of robbery in the first degree and kidnapping in the first degree.<sup>1</sup> Id. at 749. Thorne argued his sentence was grossly disproportionate to his crimes and therefore violated the federal and state constitutional prohibitions against cruel and unusual punishment. Id. at 772. Analyzing the sentence under the more protective state constitutional prohibition against cruel and unusual punishment, the Court concluded: “Based on a consideration of the *Fain* factors, we hold that the sentence of life imprisonment without possibility of parole is not grossly disproportionate to the offenses committed in this case.” Id. at 772–73, 776.

Because the Supreme Court has already held that a life sentence without possibility of parole for this defendant committing the same crime—first degree robbery—does not violate the prohibition on cruel and unusual punishment, we have no option but to conclude the same. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (lower courts are bound by the Supreme Court’s interpretation of Washington law).<sup>2</sup>

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<sup>1</sup> According to the prosecuting attorney’s sentencing memo, after the Washington Supreme Court decided his 1996 case, Thorne appealed his sentence in the federal system. The federal judge expressed concern that his defense attorney had not explored an insanity defense in a trial for first degree robbery and first degree kidnapping, so the prosecutor and defense attorneys arranged a plea deal whereby Thorne was allowed to plead out on non-strike offenses, and the robbery and kidnapping were dismissed. He was then sentenced to 240 months (consecutive sentences for two counts of unlawful imprisonment, each at 60 months, and one count of first degree theft, at 120 months) and was released in August 2006. The two strikes for purposes of the current sentence on appeal are his 1980 conviction for second degree robbery and his 1988 conviction for first degree robbery, both of which are most serious offenses as defined by RCW 9.94A.030(29)(a) and .030(29)(o).

<sup>2</sup> Thorne also argues that under Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), a life sentence without the possibility of parole

## II. Due Process

Thorne argues that his federal constitutional rights under the Sixth and Fourteenth Amendments were violated when the trial court, and not a jury, found the existence of his prior two strikes for sentencing purposes under the POAA.

Both the United States Supreme Court and our Supreme Court have held that there is no violation of the Sixth Amendment or the due process clause of the Fourteenth Amendment when a judge determines by a preponderance of the evidence that a defendant has two prior “strikes” for purposes of the POAA. Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000))); Smith, 150 Wn.2d at 141–43 (specifically holding that there is no right to a jury trial on prior convictions used to establish persistent offender status under the POAA); see also State v. Thiefaul, 160 Wn.2d 409, 418, 158 P.3d 580 (2007) (due process does not require the fact of a prior conviction to be submitted to a jury and proved beyond reasonable doubt for sentencing purposes). There is no due process violation present.

## III. Equal Protection

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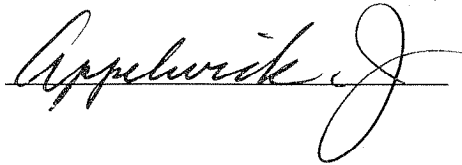
for someone with documented mental illness constitutes cruel and unusual punishment. While we are sympathetic to Thorne’s mental health problems and his need for treatment while incarcerated, the analysis in Atkins applies only to capital sentences for mentally retarded individuals. 536 U.S. at 321.

Thorne finally argues that his right to equal protection was compromised, because certain recidivists receive greater procedural protection for proof of a prior conviction, where the prior conviction is an element of a crime rather than a basis for an aggravated sentence. Thorne contends there can be no rational basis for treating recidivists differently. He explains that under State v. Roswell 165 Wn.2d 186, 192–93, 196 P.3d 705 (2008), if a prior conviction alters the crime that may be charged, the prior conviction is an essential element that must be proven to a jury beyond a reasonable doubt. But, where a prior conviction is a sentencing factor a trial court may find the fact of prior conviction necessary for a sentence under the POAA. Smith, 150 Wn.2d at 141–43.

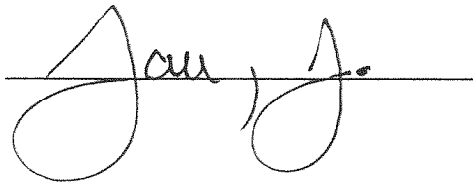
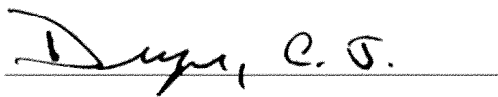
The defendant in State v. Langstead raised an identical equal protection challenge. 155 Wn. App. 448, 455, 228 P.3d 799 (2010) (“Langstead challenges as arbitrary the distinction drawn in *Roswell* between a prior conviction used as an element and a prior conviction used to aggravate a sentence.”). As a threshold matter, we noted that recidivists who are eligible for sentencing under the POAA are not situated similarly to recidivists like Roswell. Id. at 455. Recidivists whose prior felony convictions are used as aggravators necessarily must have prior felony convictions before they commit the current offense. Id. at 455–56. This is not necessarily true for recidivists like Roswell, who was convicted of the crime of felony communication with a minor for immoral purposes. Roswell, 165 Wn.2d at 192. This crime is elevated from a gross misdemeanor to a felony if the defendant was previously convicted of the crime or a felony sexual offense. RCW 9.68A.090(2).

We then applied rational basis, analyzed the distinction created by Roswell, and concluded that “recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense.” Langstead, 155 Wn. App. at 456–57. We rejected Langstead’s equal protection challenge. Id. at 457. We reject Thorne’s equal protection challenge as well.

We affirm Thorne’s sentence under the POAA.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Jones J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Dwyer, C. S.", written over a horizontal line.